

ORIGINAL

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
 )  
JAMES A. KAY, JR. )  
 )  
Licensee of one hundred sixty )  
four Part 90 licenses in the )  
Los Angeles, California area )

PR DOCKET NO. 94-147  
WT DOCKET NO. 94-147

To: Hon. Richard L. Sippel, Administrative Law Judge

**MOTION FOR A PROTECTIVE ORDER**

James A. Kay, Jr. (Kay), by his attorneys, respectfully requests that the Presiding Judge issue a Protective Order with respect to certain of the information of which discovery has been requested by the Wireless Telecommunications Bureau (the Bureau) in the above captioned matter. In support of his position, Kay shows the following.

On February 17, 1995, the Bureau served on Kay its First Set of Interrogatories and its First Request for Documents. The Bureau's Interrogatory number 4 requests "with respect to each of the call signs listed in Appendix A of the Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing for Forfeiture, FCC 94-315 (released December 13, 1994), identify each and every "end-user" (i.e., customer) and the number of mobile units of each such "end-user" since January 31, 1991." The Bureau's Document Request number 4 requests

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all documents, including, but not limited to, billing and business records, in existence since January 1, 1991, relating to each "end-user" (i.e., customer) and the number of mobile units (i.e., mobile loading) of each "end-user" (i.e., customer) of each of the following stations:

(a) the stations identified by call sign in Appendix A of the Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing for Forfeiture, FCC 94-315 (released December 13, 1994); and

(b) All other stations owned, operated, or under the control of Kay since January 1, 1991.

The Bureau's Document Request 5 requests "all documents in existence since January 1, 1991, relating to 'end-users' (i.e., customers) of stations not encompassed by subsections (a) or (b) of Document Request No. 4."

The information covered by the above quoted discovery requests of the Bureau is of the essence of Kay's business. Were information concerning the identities of Kay's customers to fall into the hands of his competitors, the loss of the secrecy of proprietary information would be highly destructive to Kay's business. Disclosure of the identity of Kay's customers to persons other than Commission employees would make it easy for his competitors to go directly to his customers to solicit their trade. Knowledge by Kay's competitors of the services which he provides to specific customers and the charges which he makes to them would unfairly enable Kay's competitors to know exactly how to position their offerings to raid his customer base.

In a currently pending legal action between Kay and one of his competitors in the State of California, the competitor has sought discovery of the same information requested by the Bureau's above referenced discovery requests and Kay is concerned that the competitor may

request that the Bureau make that information available to him. Kay has not been able to obtain any assurance from the Bureau that, in the event that a person other than a Commission employee requested inspection of the information, the Bureau would assert Exemption 4 to the Freedom of Information Act, 5 U.S.C. §552(b)(4); 47 C.F.R. 0.457(d). Kay is willing to permit inspection of the information covered by the above quoted Bureau requests, but Kay requires assurance that reasonable precautions will be taken to safeguard the secrecy of the requested information and to prevent its general disclosure to persons other than Commission employees.

Kay has no confidence that he can rely upon the Commission staff which conducted the investigation which led to the above captioned proceeding to protect the confidentiality of information entrusted to its care and protected by statute or Commission Rule. At hearing, ample evidence will be offered to demonstrate that Kay has good cause to believe that he cannot rely on the Commission staff to protect the confidentiality of information in matters involving him. Accordingly, to facilitate discovery by the Bureau, Kay respectfully requests that the Presiding Judge issue a Protective Order upon which Kay can rely to protect the confidentiality of his most sensitive proprietary business information.

Section 1.313 of the Commission's Rules authorizes the presiding officer in a hearing proceeding to issue any order consistent with the rules governing discovery "which is appropriate and just for the purpose of protecting parties and deponents or providing for the proper conduct

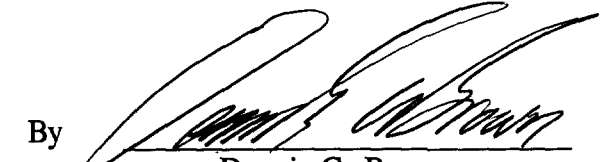
of the proceeding," 47 C.F.R. §1.313. Pursuant to Rule Section 1.313, Kay respectfully requests that the Presiding Judge issue the Protective Order which is attached hereto.

Conclusion

For all the foregoing reasons, Kay respectfully requests the issuance of a Protective Order with respect to his proprietary business information.

Respectfully submitted,  
JAMES A. KAY, JR.

By

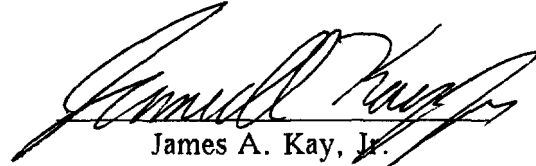
  
Dennis C. Brown

Brown and Schwaninger  
1835 K Street, N.W.  
Suite 650  
Washington, D.C. 20006  
202/223-8837

Dated: March 3, 1995

AFFIDAVIT

I declare under penalty of perjury under the laws of the United States that the foregoing Motion for a Protective Order is true and correct. Executed on March 2, 1995.

  
James A. Kay, Jr.

# **ATTACHMENT**

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of	)	
	)	
JAMES A. KAY, JR.	)	PR DOCKET NO. 94-147
	)	WT DOCKET NO. 94-147
Licensee of one hundred sixty	)	
four Part 90 licenses in the	)	
Los Angeles, California area	)	

ORDER

Issued: March \_\_\_\_\_, 1995 ;      Released: March \_\_\_\_\_, 1995

The Wireless Telecommunications Bureau (the Bureau) has requested discovery of James

A. Kay, Jr. (Kay) as to the following information:

With respect to each of the call signs listed in Appendix A of the Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing for Forfeiture, FCC 94-315 (released December 13, 1994), identify each and every "end-user" (i.e., customer) and the number of mobile units of each such "end-user" since January 31, 1991."

Bureau's First Set of Interrogatories number 4.

All documents, including, but not limited to, billing and business records, in existence since January 1, 1991, relating to each "end-user" (i.e., customer) and the number of mobile units (i.e., mobile loading) of each "end-user" (i.e., customer) of each of the following stations:

(a) the stations identified by call sign in Appendix A of the Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing for Forfeiture, FCC 94-315 (released December 13, 1994); and

(b) All other stations owned, operated, or under the control of Kay since January 1, 1991.

Bureau's First Request For Documents number 4.

all documents in existence since January 1, 1991, relating to 'end-users' (i.e., customers) of stations not encompassed by subsections (a) or (b) of Document Request No. 4. Bureau's First Request for Documents number 5.

Kay has demonstrated that he has no confidence that the Bureau will protect the secrecy of the requested information. Kay has received no assurance from the Bureau that it will assert the Exemption provided by the Freedom of Information Act, 5 U.S.C. §552(b)(4), 47 C.F.R. §457(d), in the event that inspection of the information is requested by a person other than a Commission employee. Therefore, the Presiding Judge finds that good cause exists to order protection of the confidentiality of the requested information. Therefore,

It is ORDERED that,

a) the Bureau shall make no more than one copy of the information supplied by Kay in response to its First Set of Interrogatories number 4 and its First Request for Documents numbers 4 and 5;

b) except as necessary to enter into evidence information supplied by Kay in response to its First Set of Interrogatories number 4 and its First Request for Documents numbers 4 and 5, the Bureau shall make no disclosure of such information to any person other than a Commission employee;

c) Upon the close of the hearing in the above captioned matter, the Bureau shall immediately return to Kay all of the information supplied by Kay in response to the Bureau's First Set of Interrogatories number 4 and its First Request for Documents numbers 4 and 5, and

the Bureau shall destroy all copies of such information to the extent that such information was not entered into evidence at hearing.

SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION

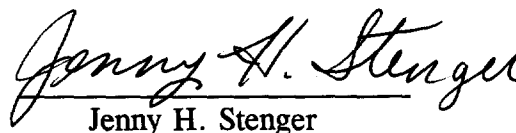
Richard L. Sippel  
Administrative Law Judge

CERTIFICATE OF SERVICE

I, hereby certify that on this third day of March, 1995, I served a copy of the foregoing Motion for a Protective Order on each of the following persons by placing a copy in the United States Mail, first-class postage prepaid:

Gary P. Schonman, Esquire  
Federal Communications Commission  
Hearing Branch  
Mass Media Bureau  
Suite 7212  
2025 M Street, N.W.  
Washington, D.C. 20554

W. Riley Hollingsworth, Esquire  
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Office of Operations  
Federal Communications Commission  
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Gettysburg, PA 17325

  
Jenny H. Stenger